

NOTICE OF PROPOSED RULEMAKING
TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

The Public Employment Relations Board (PERB or Board) proposes to adopt or amend the regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Board proposes to amend sections 32135, 32166, 32500, 32630, 32700, 32781, 32784, 32786, 33480, 61020, 61450, 61470, 61480, 81020, 81450, 81470, 81480, 91020, 91450, 91470, and 91480, and to adopt new sections 32705, 33485, 61025, 81025, and 91025.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on April 12, 2007, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comment relevant to the proposed regulatory action to the Board. The written comment period closes at 5:00 p.m. on April 6, 2007. Written comments will also be accepted at the public hearing. Submit written comments to:

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AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and

regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32135: Sections 3509, 3513(h), 3541.3(n), 3563(m), 71639.1 and 71825, Government Code, and Section 99561(m), Public Utilities Code. General reference for section 32166: Sections 3509, 3513(h), 3541.3(a), (b), (h), (l), (m), (n), 3563(a), (c), (g), (k), (l), 71639.1 and 71825, Government Code, and Section 99561(a), (c), (g), (k), (l), Public Utilities Code. General reference for section 32500: Sections 3509, 3509.5, 3520, 3542, 3564, 71639.4 and 71825.1, Government Code, and Section 99562, Public Utilities Code. General reference for section 32630: Sections 3502.5, 3509, 3513(h), 3514.5, 3515.7, 3519, 3519.5, 3523, 3541.3(i), (n), 3541.5, 3543.5, 3543.6, 3546.5, 3547, 3547.5, 3563(h), (m), 3563.2, 3571, 3571.1, 3571.3, 3584, 3587, 3595, 71632.5, 71639.1, 71814, and 71825, Government Code, and Sections 99561(h), 99561.2, 99563.7, 99563.8, 99566.3, and 99569, Public Utilities Code. General reference for section 32700: Sections 3513(h), 3515.7(d), 3520.5, 3544, 3544.1, 3544.3, 3544.5, 3544.7, 3546, 3573, 3574, 3575, 3576, 3577 and 3583.5, Government Code, and Sections 99561(c), (e), (k), (l), 99564, 99564.1, 99564.2, 99564.3, 99564.4 and 99566.1, Public Utilities Code. General reference for proposed new section 32705: Sections 3513(h), 3515.7(d), 3520.5, 3544, 3544.1, 3544.3, 3544.5, 3544.7, 3546, 3573, 3574, 3575, 3576, 3577 and 3583.5, Government Code, and Sections 99561(c), (e), (k), (l), 99564, 99564.1, 99564.2, 99564.3, 99564.4 and 99566.1, Public Utilities Code. General reference for section 32781: Sections 3513(h), 3541.3(a) and (e) and 3563(a), Government Code, and Section 99561(a), (e), Public Utilities Code. General reference for section 32784: Sections 3513(h), 3541.3(a), (e) and 3563(a), Government Code, and Section 99561(a), (e), Public Utilities Code. General reference for section 32786: Sections 3513(h), 3541.3(a), (e) and 3563(a), Government Code, and Section 99561(a), (e), (g), Public Utilities Code. General reference for section 33480: Sections 3541.3(c), (l), 3544, 3544.1, 3544.3 and 3544.7, Government Code. General reference for proposed new section 33485: Sections 3541.3(c), (l), 3544, 3544.1, 3544.3 and 3544.7, Government Code. General reference for section 61020: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code. General reference for proposed new section 61025: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code. General reference for section 61450: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code. General reference for section 61470: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509

and 3541.3(a) and (e), Government Code. General reference for section 61480: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code. General reference for section 81020: Sections 3541.3, 71632.5, 71636, 71636.3, 71637, 71637.1 and 71639.1, Government Code. General reference for proposed new section 81025: Sections 3541.3, 71632.5, 71636, 71636.3, 71637, 71637.1 and 71639.1, Government Code. General reference for section 81450: Sections 3541.3, 71636, 71636.3, 71637, 71637.1 and 71639.1, Government Code. General reference for section 81470: Sections 3541.3, 71636, 71636.3, 71637, 71637.1 and 71639.1, Government Code. General reference for section 81480: Sections 3541.3, 71636, 71636.3, 71637, 71637.1 and 71639.1, Government Code. General reference for section 91020: Sections 3541.3, 71814, 71823 and 71825, Government Code. General reference for proposed new section 91025: Sections 3541.3, 71814, 71823 and 71825, Government Code. General reference for section 91450: Sections 3541.3, 71823 and 71825, Government Code. General reference for section 91470: Sections 3541.3, 71823 and 71825, Government Code. General reference for section 91480: Sections 3541.3, 71823 and 71825, Government Code.

POLICY STATEMENT OVERVIEW

The statutes administered by PERB did not, prior to 2002, mandate recognition of employee organizations based solely on a review of proof of support materials. While certain of the statutes, including the Educational Employment Relations Act (EERA) and Higher Education Employer-Employee Relations Act (HEERA), allowed for voluntary recognition based on verification by PERB of a petitioner's majority support, and in fact voluntary recognition was quite common under EERA, recognition was never mandated without an election.

Effective January 1, 2002, the Meyers-Milias-Brown Act (MMBA) was amended to require an employer to recognize an employee organization based solely on a card check, so long as the petition involved an appropriate unit and there was no competing organization. Since PERB seldom directly handles representation matters under the MMBA, this change did not significantly affect how PERB processed cases.

However, both EERA and HEERA were amended, effective January 1, 2004, to also provide for card check recognition where a petitioner demonstrates majority support in an appropriate unit and there is no intervening petitioner. These legislative developments largely form the basis for the substantive changes being proposed.

The most extensive area of proposed changes involves proof of support. While a number of changes are recommended, and are explained further below, particular attention is merited for two changes. First, the proposed changes would add a requirement for proof of support in cases where a petition may lead to recognition of the petitioner as exclusive representative without an election. In such a case, the Board will consider adding a requirement that the proof of support material include language by which the employee signing a proof of support document acknowledges that an election may not be required.

Second, the Board will consider regulations addressing when and how an employee can revoke an authorization card or petition previously signed by the employee. In early 2006, the Board

for the first time recognized a right of employees to revoke authorization cards. (Antelope Valley Health Care District (2006) PERB Decision No. 1816-M.) The Antelope Valley decision addressed the issue in the context of an unfair practice charge case arising under the MMBA and did not address when support may be revoked or how it may be revoked. The proposed regulations would provide both procedural and substantive requirements for revocation of proof of support, including provisions that would make revocation available as an option only in cases that may not require an election. Thus, revocation would not be available in cases, such as fair share fee rescission and decertification, where no change in the status quo can result without an election.

Another substantive change addressed by this package provides a mechanism for PERB to certify an exclusive representative under EERA where the requirements for card check recognition are met. A similar provision was previously adopted for HEERA, and the addition of a new section 33485 is proposed for EERA as a means to facilitate the closure of representation cases under that Act.

In addition to the substantive changes in the areas described above, this rulemaking package includes numerous changes to existing regulations that are proposed to clarify, conform or correct the regulation.

INFORMATIVE DIGEST

Section 32135 sets forth filing requirements, including in subsection (c) the service requirements for documents filed by fax or on-line. The proposed revisions to subsection (c) are intended to conform the language to changes to Section 32140 that were approved by the Board in February 2006 and that took effect May 11, 2006.

Section 32166 provides a means for an organization to become a full party to a representation hearing, and includes a proof of support requirement. The regulation includes cross-references to the proof of support provisions in Chapters 1 and 5, but was not amended to include reference to Chapters 7 and 8 that were added to the regulations in 2004. The proposed revision corrects this oversight.

Section 32500 concerns requests for judicial review of a Board decision in a representation matter. The regulation allows 20 days from the date of the decision for such a request to be filed, but only allows 10 days for responses to the request. With other appeals, such as exceptions to a proposed decision and administrative appeals, responding parties are allowed a time equivalent to that given to the appealing party. The proposed revision would bring section 32500 into conformance with this general policy.

A nonsubstantive, grammatical correction is proposed for section 32630. Section 32630 concerns the issuance of a refusal to issue complaint and dismissal of an unfair practice charge.

Changes to subsection (a) of sections 32700, 61020, 81020 and 91020 are proposed addressing two concerns. The first involves an effort to describe in plain English the requirements as to the statement of intent that must be a part of the proof of support document(s). The nature of

the language required varies by type of filing, and the revisions proposed here are intended to spell out those differing requirements in one place to make the regulation more useful to employees and employee organizations who circulate or are asked to sign proof of support.

The second change, affecting only subsection (a)(1) of the same sections, concerns representation petitions that can result in recognition of the petitioner without an election. While EERA and HEERA as first enacted allowed for voluntary recognition of a majority petitioner, if no competing organization intervened, the statutes also allowed the employer to require an election. With recent legislative enactments, “card-check recognition” is mandated under EERA, HEERA, MMBA, the Trial Court Act and the Court Interpreter Act where the petitioner demonstrates majority support in an appropriate unit and no competing organization successfully intervenes. These legislative developments mean that, in many cases, the review of the proof of support constitutes the “election.” This has led to heightened concerns and interest regarding employee awareness of the significance and consequences of the documents that they are asked to sign. The change proposed would provide for an additional requirement with regard to the intent content of proof of support documents in such cases.

In addition, the deletion of paragraph (5) in section 32700(e), as well as in sections 61020(d), 81020(d) and 91020(d), is proposed. This change would remove the provision allowing a petitioner to submit, as its proof of support, “other evidence as determined by the Board” in lieu of one of the specific types of documents otherwise listed.

The final change affecting sections 32700, 61020, 81020 and 91020, involves the deletion of a sentence in subsection (g) of section 32700 and subsection (f) of the other sections that contemplates a Board agent making a “prima facie” determination concerning alleged fraud or coercion in the gathering or submission of proof of support. The prima facie standard, more often utilized in unfair practice cases as a threshold question in the processing of a charge, is not appropriate in this context. The sentence at issue implies that PERB will investigate the fraud or coercion allegations only if a prima facie showing is made. The proposed revisions are intended to make it clear that any such allegations, if supported by evidence, will be investigated and addressed in the support determination finding.

The intent of proposed new sections 32705, 61025, 81025 and 91025 is to provide guidance for employees, parties and PERB staff with regard to the revocation of proof of support. The proposed sections would provide in part that only the petitioner may withdraw proof of support materials submitted to the Board. The proposed language limits individual employee revocations to situations where an election may not be required, recognizing that where an election is held employees have an opportunity, at the ballot box, to signify their change of heart. Under EERA, HEERA and the MMBA, as well as the two trial court acts, a majority petitioner in an appropriate unit must be recognized by the employer unless a competing organization intervenes with at least 30 percent proof of support. Having signed a card for the majority petitioner, the employee may not have an opportunity, without the revocation process, to effectuate a change in his or her intent to support the petitioner. The proposed new sections also provide that submission of revocation cards must be by the employee him or herself. This language is intended to mitigate the filing of unfair practice charges alleging that an employer or employee organization has coerced employees into revoking support for a petitioner. The

language proposes a time period for the submission of revocations that is congruent with the posting/intervention period. This language recognizes the interest in expedited resolution of questions concerning representation. The proposals also assure confidentiality for employees who submit revocations, and seek only minimal information in addition to the required intent language; both provisions are consistent with requirements for authorization cards and petitions.

In 2006, the Board approved various amendments to sections 32781, 61450, 81450 and 91450 (unit modification petitions). In addition to clarifying when majority employee support would be required for a unit modification petition, the amendments also provided for circumstances where at least 30 percent employee support would be required. The changes to sections 32781, 32784, 32786, 61450, 61470, 61480, 81450, 81470, 81480, 91450, 91470, and 91480 are, with one exception, proposed to conform language as necessary to reflect the changes adopted earlier. The exception concerns proposed language to be added to section 32786(b) that addresses an instance where unit modification petitions should be dismissed, and conforms the language to that presently found in sections 61480, 81480 and 91480.

Proposed new section 33485, and a conforming change to section 33480, would provide for the certification of an exclusive representative under the EERA where no election is required.

LOCAL MANDATE

This proposal does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary costs or savings on local agencies. This proposal does not result in any costs or savings in federal funding to the state.

COSTS OR SAVINGS TO STATE AGENCIES

No additional costs or savings to state agencies are anticipated.

BUSINESS IMPACT/SMALL BUSINESSES

PERB has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposal does not affect small businesses as defined by section 11342.610. The proposal only affects public employers, public employees and employee organizations representing public employees.

ASSESSMENT REGARDING EFFECT ON JOBS/BUSINESSES

PERB has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

EFFECT ON HOUSING COSTS

None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative considered by it, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected private persons than the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons may be obtained by contacting Les Chisholm, Division Chief, Office of the General Counsel, at the address or phone number listed below.

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of

reasons should be sent to the attention of Les Chisholm, Division Chief, Office of the General Counsel, at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

WEB SITE ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed, will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

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